IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1054

HASKLE THURMAN,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

REPLY OF STATE TO PETITION FOR WRIT OF CERTIORARI

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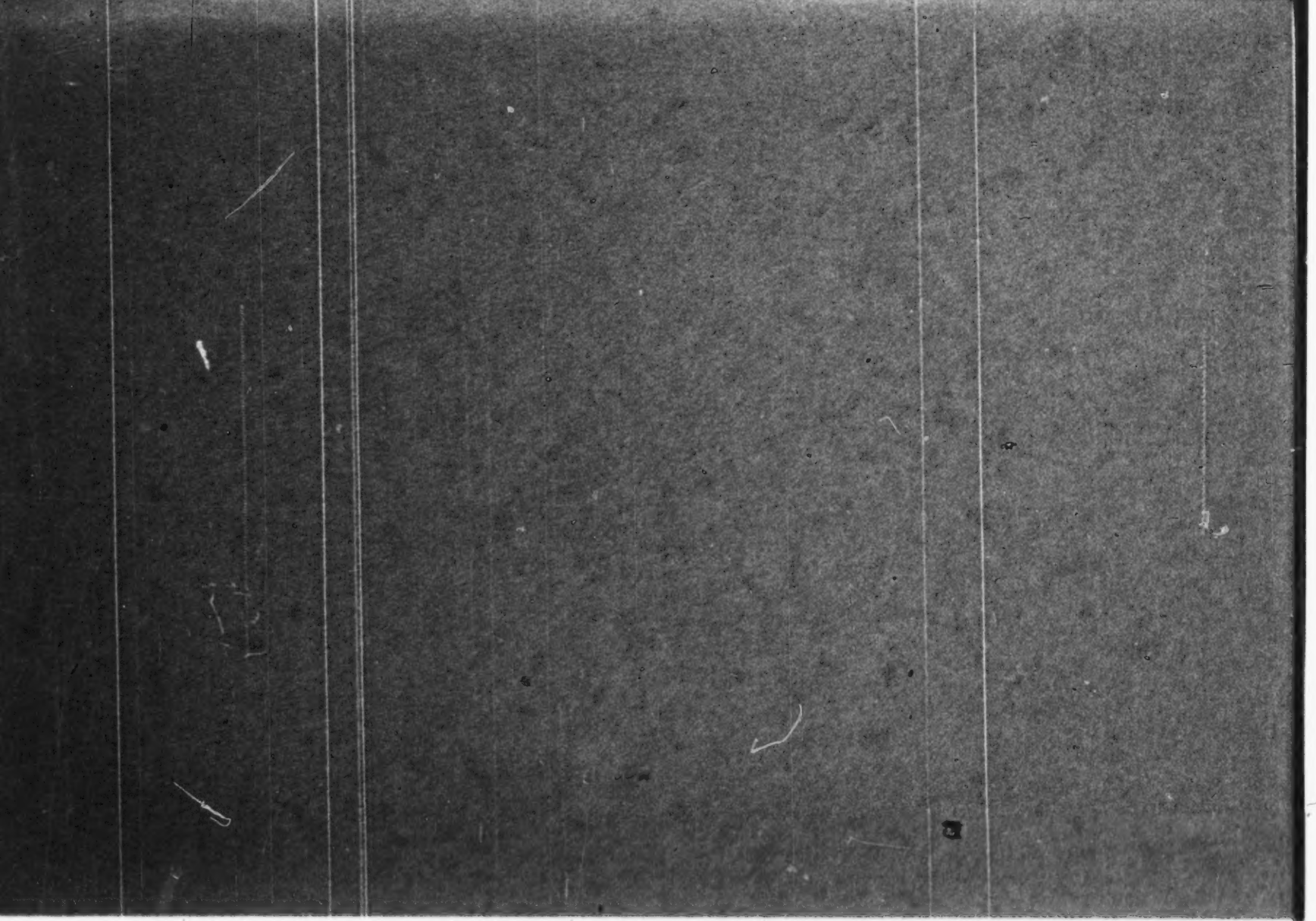

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MAY IT PLEASE THE COURT:

The petitioner, Haskle Thurman, seeks a review and reversal of the judgment of the Court of Criminal Appeals, State of Tennessee, affirming his conviction for transporting unstamped whiskey in this State, in violation of Section 39-2509, Tennessee Code Annotated, and sentence of not less than one (1) nor more than two (2) years in the State Penitentiary.

QUESTIONS PRESENTED

Counsel for the petitioner presents four (4) questions of law to be determined by this Court in this cause. Counsel for the State insists that these questions all are to the effect that the officers who arrested the petitioner did not have sufficient evidence that the petitioner was committing the offense charged to warrant a conclusion on the officers' part that probable cause existed to believe petitioner was guilty, and (2) that counsel for the petitioner was not permitted to cross-examine the officers sufficiently with respect to their informant to determine whether or not he was a reliable person.

The State insists that both of these questions should be answered favorably to the State and that the petition for certiorari in this cause should be denied.

EVIDENCE AND ARGUMENT

When the case was heard before the Court of Criminal Appeals there was no dispute regarding the evidence by the counsel representing the petitioner and counsel for the State. Sufficient whiskey was found in the petitioner's car to amount to the offense and there is no argument this evidence is not sufficient to warrant his conviction, if admissible.

The State insists that the evidence was admissible. Whether or not an informant must detail circumstances to an officer in order for the officer to have sufficient information to make an arrest without a warrant when the officer has on numerous occasions before received information from the informant and found him reliable as the evidence revealed to be true in this case, corroborated, of course, by the fact that the petitioner did appear at the place and in the type automobile the informant had told

the officer petitioner would do, was considered by the United States Circuit Court of Appeals, Ninth Circuit, in the case of **Herreres v. United States** in an opinion dated May 28, 1969, according to Vol. 5, No. 14, of the Criminal Law Reporter and ruled upon unfavorably to petition position in this cause. The only difference between the **Herreres** case and the present case is that the officers kept the automobile in question in the **Herreres** case under surveillance about four days and observed that it was handled exactly as their informant told them it would be handled, thus thoroughly corroborating the petitioner's statement to the officers.

The other question regarding the sufficiency of the description of the automobile and the petitioner is very similar to that in a case recently decided in the Supreme Court of this State. **State v. Tolden**, ... Tenn. ..., 451 S. W. 2d 432.

The pertinent information the officer received in the case now under consideration was that the petitioner would appear at a certain place about 7:00 a. m. on the morning of October 29th in a 1958 blue Chevrolet; and that the petitioner was a white male who usually wore overalls and that he would have ten (10) to thirty (30) gallons of unstamped whiskey in his automobile. The officers staked out the place their informant had told them the car would appear and at 6:50 a. m., on the 29th of October, petitioner did appear in a 1958 blue Chevrolet automobile. The officers had known the informant for a period of two and one-half years and had received information of this type from him on several occasions and the informant had always been reliable. The officer did not ask the informant how he knew whiskey would be in the car. The petitioner when he appeared was wearing overalls and met the general description given of him by the informant to the officers.

In Brown v. U. S., 365 Fed. 2d 976 (C. A. D. C. 1966) Judge Burger, now Chief Justice Burger of this Court, held that the probable cause existed for an arrest when the basis of the arrest was a description of a "heavily built Negro male driving a maroon 1954 Ford." The relevant facts were as follows: At about 4:30, two officers stopped an old maroon Ford automobile because the tag light of the automobile was out. The officer remaining in the squad car heard a report of the aforementioned robbery and heard that there was a lookout for a heavily built Negro male driving a 1954 Ford. On the issue of probable cause for an arrest the Court held:

> "This information was sufficiently particular to lead the officers directly to the suspect. See Wong Sun v. United States, 371 U. S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The total number of 1954 Fords meeting that description being driven in 1964 was limited; still smaller was the total number being driven at 4:30 on a Monday morning, and yet smaller those driven in that immediate neighborhood at that time by heavy Negro males. Ordinary human experience alone, without resort to the precise factors of the law of probability, tells us this" (365 F. 2d at 978).

The opinion of the Court of Criminal Appeals did not decide this question but held that the petitioner gave the officers permission to search his automobile without a search warrant at the time the officers stopped him. The testimony by one of the officers relied upon by the Court of Criminal Appeals, State of Tennessee, in support of this conclusion, was:

> "I walked up to the defendant's car, advised him who I was, I was a police officer, that we had information that he was hauling whiskey and asked him if he would mind opening the trunk of his car. He said I don't have a key to the trunk and I said, well, we can

obtain a warrant. He said, well, you've got me and reached into the floorboard and got the trunk key and got out of the car and opened the trunk."

Several cases in the State of Tennessee support the proposition that the petitioner can waive his right to a search provided it is done without any coercion. These cases are **Fritz v. State**, 148 Tenn. 478, 256 S. W. 2d 449; **Byrd v. State**, 161 Tenn. 306, 30 S. W. 2d 273, and **Simmons v. State**, 210 Tenn. 443, 360 S. W. 2d 10.

The Simmons case was later considered by the United States District Court for the Middle District of Tennessee under the style of **Simmons v. Bomar**, 230 F. Supp. 226, at Page 229 of that case, it was said:

"There is no question that one's constitutional right to demand a search warrant can be waived or that one can consent to a search without a warrant. United States v. Jones, 204 F. 2d 745 (7th Circ. 1953), cert. denied, 346 U. S. 854, 74 S. Ct. 67, 98 L. Ed. 368. However this is not presumed, and the burden is upon the state to show that a competent and voluntary waiver has been made. Mere acquiescence or consent in the face of an announced or apparent intention to search with or without a warrant or permission does not constitute a waiver. See Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654 (1921); Catalanotte v. United States, 208 F. 2d 264 (6th Cir. 1953); Judd v. United States, 89 U. S. App. D. C. 64, 190 F. 2d 649 (1951); United States v. Evans, supra.

"However, where, as here, the consent is given in response to an announced intention to leave and secure a warrant if permission is not given, the waiver is competent and voluntary. Gatterdam et al. v. United States, 5 F. 2d 673 (6th Cir. 1925); United States v. Page, 302 F. 2d 81 (9th Cir. 1962); Grice v. United

States, 146 F. 2d 849 (4th Cir. 1945); United States v. Haas, 106 F. Supp. 295 (W. D. Pa. 1952); Frix v. State, 148 Tenn. 478, 256 S. W. 442 (1923)."

The obvious purpose from the record of the cross-examination counsel for the petitioner was not authorized to make in this cause, and about which he now complains, was to find out the name of the informant. In this State the law is well established that it is within the discretion of the trial judge whether or not the arresting officers should be required to reveal the name of a person who gave them the information upon which they relied for making the arrest. Simmons v. State, 198 Tenn. 587; Smith v. State, 169 Tenn. 633, and Shields v. State, 197 Tenn. 83. Other authorities on the case are Underhill's Criminal Evidence, Sec. 287; Roscoe's Criminal Evidence, Sec. 179, and Wigmore on Evidence, Sec. 2374.

Counsel for the State insists that the petition for certiorari in this cause should be dismissed. The officers were justified in making the arrest. They had reasonable cause to believe the petitioner was hauling unstamped whiskey in violation of the law of this State because they had such information from a reliable informant to that effect, and it was not necessary in this case that the trial judge make the State produce for the petitioner the name of the informant relied upon by the officers.

Respectfully submitted

DAVID M. PACK
Attorney General
State of Tennessee

THOMAS E. FOX
Deputy Attorney General
State of Tennessee

Certificate of Service

I, David M. Pack, Attorney General of the State of Tennessee, one of the attorneys for the respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20 day of October, 1970, I served copies of the within Reply of State to Petition for Writ of Certiorari on Haskle Thurman, Petitioner, by mailing copy in duly addressed envelope, postage paid, to counsel of record, namely, Honorable Jesse O. Farr, Attorney at Law, 424 Pioneer Building, Chattanooga, Tennessee 37402.

David M. Pack
Attorney General
State of Tennessee